and vicissitudes of business, in order to equalize the charges upon them; periodical assessments, if they produce injustice in one case, may correct it in the next, and on the whole are likely to be fair. An any rate, they constitute the best regulation the law can establish. 'In the imposition of taxes, exact and critical justice and equality are absolutely unattainable. If we attempt it, we might have to divide one year's tax upon a given article of property among a dozen different individuals who owned it at different times during the year, and then be almost as far from the desired end as when we started. The proposition is utopian. The legislature must adopt some practicable system;' and this practicable system is found to be the one which has been indicated. Every person is therefore to be taxed for the year upon his personalty, estimated as of the time of the assessment, and every parcel of real estate according to its value as set down in the proper list or roll. Changes in the ownership of property, or in the value after the periods of assessment, cannot be taken notice of in taxation until the time for a new assessment has arrived. * * *"

See also, § 546, as follows:

"* * * There must be some day of the year as of which the power to tax property at all, or the power to tax it to a certain person, is to be determined. That day will fix the power to tax with reference (1) to whether the property was in existence on that date, (2) whether the property was within the jurisdiction so as to have taxable situs on that day, (3) whether the property was exempt from taxation on that day and (4) whether the property should be taxed to one person or another as dependent on its ownership on that day."

In accord with this, see Section 84 C.J.S., Taxation, § 60, wherein it is stated:

> "* * * *Subject to constitutional restrictions, the state may select the time as of when tax liability shall be determined, and the taxable status of persons and property will be determined as of the time specified in the statute.* Unless a legislative act limits the term for taxation, a tax term fixed by statute carries with it the fractional part of the year. *As between the state and the taxpayer, the latter is liable for the taxes on such taxable property as he owned on the day fixed by law for the completion of the assessment*, or, according to the statute, on the day fixed for the filing of taxpayers' lists or schedules, his liability attaching as of that date. * * *" (Emphasis supplied.)

When Appellant brought tangible personal property into this State, Appellant was not guaranteed that the tax assessment date would not be changed by the Legislature. All authorities support the view that the Legislature may change the tax assessment date. Appellant is attempting to claim that merely because Appellant's property did not acquire a permanent situs in this State, it is unfair to change the assessment date; however, Appellant fails to realize that it enjoyed the protection of the laws of this State during the time such property was located in this State, and, therefore, Appellant should be made to contribute to the expenses incident to protecting its property just as all other property owners are required to contribute.

In *United Telephone Mutual Aid Corporation* v. *The State of North Dakota and the County of Cavalier*, 87

N.W. 2d 54, the plaintiff, a mutual aid corporation, contended that the North Dakota Telephone Company, a public utility, should be taxed as a mutual aid corporation rather than as a public utility. The statute in question provided that the tax rates were to be fixed as of January 1 of each year; however, the plaintiff contended that since it had purchased the North Dakota Telephone Company on March 2nd, and the tax was not paid until August, the North Dakota Telephone Company's status should be changed to that of a mutual aid corporation, even though on January 1 it was being operated as a public utility. The Court, in deciding against the plaintiff and holding that the tax liability was fixed as of January 1, the assessment date, declared:

> "This court has had occasion to interpret statutes similar to those we have under consideration. In Gaar, Scott & Co. v. Sorum, 11 N.D. 164, 169, 90 N.W. 799, 800, we said:
>
> > " 'Section 6 and subdivision 10 of section 7, c. 126, Laws of 1897, now known as section 1181, and subdivision 10 of section 1182 Rev. Codes 1899, are as follows: (section 1181): "All property subject to taxation shall be listed and assessed every year at its value on the first day of April preceding the assessment." Section 1182, subd. 10: "Personal property shall be listed and assessed annually with reference to its value on the first day of April." The language of the above sections, when considered alone and independently of certain other provisions of the chapter to which we will hereafter refer, expresses the legislative purpose to fix upon April 1st as a point of time for determining the taxability, ownership, and

> value of both real and personal property for the purposes of taxation. Such was the construction placed upon the provisions referred to by the supreme court of Minnesota in Martin Co. v. Drake, 40 Minn. 137, 41 N.W. 942, decided Jan. 30, 1889, which was prior to their adoption in this state. Mitchell, J., speaking for the court in that case, said: "All tax laws have to fix upon some particular date in the year at which to determine the taxability as well as the ownership and value of property for purposes of assessment and taxation * * *. Every man must pay taxes on what he then owns, and at its then value, no matter how short a time he may have owned it, or how soon thereafter it is lost." '
>
> "Conformable to foregoing opinion and to what we believe is a general rule for the construction of similar assessment statutes we hold that Section 57-0605, NDRC 1943, in providing that the property of utilities shall be assessed 'with reference to the value thereof on the first day of January of that year' implies that the taxability and ownership of the property shall also be determined as of that day."

Appellee submits that, based upon these authorities, it is clear that a state has the power to determine and fix a specific date for the assessment of taxes for the next tax year. It is further submitted that if such personal property is located within the State on the date so fixed, and such property has a tax situs in the State on the assessment date, the owner of such property is liable for the payment of the personal property tax. This is true regardless of what such owner does with his property after the date the tax liability has become fixed. There is no constitutional requirement that be-

fore the owner of such property is liable for the property tax the property shall have a continuing situs in this State during the year for which the taxes are paid. Appellant cites no State or Federal authority for the proposition that before the tax in question may be levied the Appellant's property must continue to maintain a tax situs in this State during the year for which the taxes are being paid.

II.

Appellant complains that since its property was removed to Maryland, and was in Maryland on the date fixed to determine tax liability for the next tax year in that state, that West Virginia should be required to excuse Appellant from paying the personal property tax assessed against it in West Virginia, and failure to do so violates "due process". Such a position is completely without legal merit or support. The following is found in 51 Am. Jur., § 450:

> "As a matter of constitutional power, a state which otherwise has the right to tax personal property is not deprived thereof by the fact that the property is subject to taxation, or that a tax has actually been paid thereon in another state for the same period. While the principle 'mobilia sequun tur personam' still expresses the prima facie rule of situs for taxation purposes of personal property, the right of the state in which personal property, whether tangible or intangible, has an actual or business situs to assess and collect taxes thereon is no longer open to question, *and the mere fact that personal property is subject to, or has actually been subjected to the payment of, taxes at the domicil of*

the owner is not a bar to its taxation in another state where it has an actual situs. It may well be that its taxation in the former state was unauthorized or even unconstitutional. *No state is bound to make its tax laws harmonize with those of other states.* While the courts are disposed, if possible, to construe taxing statutes of the state of the owner's domicil, even though phrased in broad terms, so as to exclude personalty located in another state under such circumstances as to have acquired a situs for taxation there, this is not a declaration of an exclusive right or power of taxation in the state of the actual situs or a prohibition of taxation by both the state of the situs and the state of the domicil. Is is generally agreed that no double taxation in a constitutional sense is involved in the taxation of the same personal property by different states for the same period, * * *." (Empasis supplied.)

In the present case the property, although owned by a Maryland corporation, had on July 1, 1961, a West Virginia situs for tax purposes. This fact is not disputed by Appellant. The fact that Appellant voluntarily chose to remove its property from West Virginia to Maryland, and thereby acquire a tax situs in Maryland on the day fixed for determining tax liability in that State, does not excuse Appellant from paying West Virginia property tax. Appellant's property had a tax situs in West Virginia and in Maryland on the dates fixed by the Legislatures of the two states for the fixing of tax liability; however, this fact does not constitute double taxation, and does not constitute a violation of the Fourteenth Amendment to the United States Constitution. In *Town of Cady* v. *Alexander Construction Company*, 12 Wis. 2d 236, 107 N.W. 2d

267, the question concerned the right to tax road construction equipment brought into Wisconsin for temporary use. In holding that such equipment could be taxed, the Court stated:

> "* * * However, other courts have found no such difficulty and have held construction machinery employed in construction work in a state other than that of the owner's residence may acquire a local situs in the state in which it is used. In Hamilton & Gleason Co. v. Emery County, 1930, 75 Utah 406, 285 P. 1006, the court sustained a personal property tax on construction equipment belonging to a Colorado corporation which was brought into Utah to do construction work on a railroad. The court rejected the argument that the property was in the state for temporary use and the owner intended to remove it as soon as the contract was completed. The property was brought into Utah sometime in 1925 and was removed by April 30, 1926. In The Arundel Corporation v. Sproul, 1939, 136 Fla. 167, 186 So. 679, a personal property tax was upheld on dredges and dredging equipment used by a nonresident in constructing dikes around Lake Okeechobee in Florida under a contract with the federal government. Its owner intended to return the property to Baltimore after completing the contract. The property was in Florida from June, 1934 to December, 1935. In Griggsby Construction Co. v. Freeman, 1902, 108 La. 435, 32 So. 399, 58 L.R.A. 349, blacksmith tools and commissary store goods kept as part of a construction outfit and owned by a nonresident were held taxable. The court reasoned that the property, because of its presence in the state for six months to construct a railroad bed, had acquired a situs because it was no longer in transit and had enjoyed the benefit and protection of the

laws of Louisiana. In Eoff v. Kennefick-Hammond Co., 1906, 80 Ark. 138, 96 S.W. 986, 7 L.R.A., N.S., 704, equipment of a nonresident owner used for constructing a road bed in Arkansas for a railroad was held subject to a personal property tax on the ground it was not in transit and was in the state chiefly, if not solely, for its owner's use and profit. The court reasoned the property for the time being was incorporated in the bulk of the property of the state and was distinguishable from other property in the state in no respect except the intention of the owner to remove it at some future time. See also Gromer v. Standard Dredging Co., 1911, 224 U.S. 362, 32 S.Ct. 499, 56 L.Ed. 801, wherein a dredge, tugboat, scows, and launch were held to have a situs in Puerto Rico while there to perform a contract, although owned by a Delaware dredging corporation; and North American Dredging Co. v. State, Tex. Civ. App. 1918, 201 S.W. 1065, wherein the court held that dredging and piping equipment constituting a part of a movable seagoing dredge--boat plant used in the performance of a dredging contract in Texas and pursuant to the business of its nonresident owner, had acquired taxable situs."

In the above discussed cases, if the property had been taken back to the state of the owner's domicile no doubt exists that such property could be taxed in the state of domicile, provided it was there on the date fixed for assessing taxes. There is no violation of the "due process clause" of the Federal Constitution based upon the fact, as appellant contends, that taxed property was not physically located in the state where the tax was levied for the entire period the tax was to be paid. It must be emphasized that the Appellant's prop-

erty enjoyed the protection and benefit of the West Virginia law while Appellant's property was located in this State, and Appellant was subject to paying its fair share of taxes. Appellant cannot complain that because he was not given an absolute guarantee that the Legislature would not change the dates fixed for assessing tax liability, his constitutional rights have been violated. Appellant desires this guarantee so as to allow Appellant to move his property in and out of West Virginia to obtain specific tax advantages.

If appellant brought his personal property into West Virginia after January 1, 1962, and it had acquired a tax situs in West Virginia on July 1, 1962, could appellant claim that his constitutional rights had been violated if appellant removed the property to Maryland prior to January 1, 1963? Appellee contends that appellant could not, since appellant's property had acquired a tax situs in West Virginia on July 1, 1962. The case now before this Court is no different than numerous others, where it has been held that once property has acquired a tax situs in a particular State the owner of such property must bear a fair share of the tax burden. This is true even though the property is only temporarily within the State, and is removed from the State prior to the time the tax is paid. Appellant asserts that personal property tax, once validly assessed, may not be avoided if the property loses its tax situs before the time for payment of the tax.

In upholding the action of the Pendleton County assessor, the West Virginia Supreme Court of Appeals in *The George F. Hazelwood Company* vs. *Pitsenbar-*

ger, 149 W. Va. ___, 141 S.E. 2d 314 (1965), said that:

> "It is well settled that a Legislature of a state has the power to fix the time at which property within its jurisdiction may be assessed. 51 Am. Jur., *Taxation*, Section 441: 84 C.J.S., *Taxation*, Section 60; 38 L.R.A., (N.S.) 856 et seq. Personal Property that has never been located within a state and over which the state has no power or control or which is only temporarily within the state cannot be assessed and taxed by such state, but if it has been located within the jurisdiction of the state for a period of time and used therein it may acquire a tax situs and be assessed on any day fixed by the Legislature and the tax is determined thereby, even though the property is removed from the state before the tax is due or even before the assessor actually entered his figures. 51 Am. Jur., *Taxation*, Section 442; *San Gabriel Valley Land & Water Co.* v. *Witmer Bros. Co.*, 96 Cal. 623, 29 P. 500, affirmed on rehearing, 31 P. 588, 18 L.R.A. 465. It has been specifically held that property may be assessed six months before the tax year. *Muskogee County* v. *United States*, 133 F. 2d 61. Tangible personal property which has acquired a tax situs retains such status until it is removed from the jurisdiction of the state in which it has acquired such tax situs, and the mere intention or determination to move such property is not sufficient to cause the state in which it was located at the time the tax situs was established and the property assessed, to lose its power to tax such property. It must be actually moved before the assessment date fixed by the Legislature. 84 C.J.S., *Taxation*, Section 115; *State* v. *Crown Central Petroleum Corp.*, (Tex.) 242 S.W. 2d 457."

* * *

"It has been held in a similar case that both the State of Texas, the domicile of the owner of the property, and the state of Louisiana, into which State the property was moved, could tax the personal property, it having acquired a tax situs and having been assessed in both states for the same year. *Grigsby Construction Company* v. *Freeman*, 108 La. 435, 32 So. 399. This question is discussed in 51 Am. Jur., *Taxation*, Section 450, wherein it is stated: 'As a matter of constitutional power, a state which otherwise has the right to tax personal property is not deprived thereof by the fact that the property is subject to taxation, or that a tax has actually been paid thereon, in another state for the same period.'

"The statutory assessment date determines the taxability of property and not the actual date the assessment is made. *United Telephone Mutual Aid Corporation* v. *State of North Dakota*, 87 N.W. 2d 54."

At another point the Court declared:

"It should be pointed out that the property in question was brought into West Virginia in 1960 and was not in West Virginia on December 31, 1959 when assessment was made on such property and therefore the Hazelwood Company was not assessed or taxed for its personal property in West Virginia during the year 1960. Therefore, it can be seen that the application of the assessment and tax laws in this state, before and after the 1961 amendment tended to equalize and compensate in relation to the taxes in question and was not an unjust burden as asserted by the appellee."

While not absolutely essential to the present case, it should be noted that some doubt still exists as to whether the tax levied on July 1, 1961, is for calendar year 1962, or for the fiscal year 1962-63. This doubt has arisen because West Virginia statutes provide that the real property tax lien attaches for taxes payable for the ensuing fiscal year. Since the 1961 amendment, a great deal of confusion has existed in this State as to the period for which the taxes are being paid. Of course, this is purely a local matter, and involves no federal question. It is appellee's contention that the Supreme Court of West Virginia in *The George F. Hazelwood Company* vs. *Pitsenbarger, supra,* did not decide this question.

Appellant relies upon *Union Refrigerator Transit Company* v. *Kentucky,* 199 U.S. 194, 50 L.Ed. 150, 26 S.Ct. 36, 4 Ann. Cas. 493 (1905), to support the position that West Virginia is prohibited from levying a tax upon appellant's tangible personal property which acquired a tax situs in West Virginia. The question before this court in *Union Refrigerator Transit Company* v. *Kentucky, supra,* concerned whether a corporation organized under the laws of Kentucky is subject to Kentucky taxation upon its tangible personal property permanently located in other states and employed there in carrying on its business. Certainly this is not the present situation. West Virginia did not attempt to levy taxes upon the tangible personal property located outside the boundaries of West Virginia, as was attempted in *Union Refrigerator Transit Company* v. *Kentucky supra,* and, therefore such case has no application to the present facts.

Another decision, which is particularly important, is *Muskogee County* v. *United States*, 133 F. 2d 61, cited by the West Virginia Supreme Court in deciding this matter. In that case it is specifically held that property may be assessed six months before the tax year. The following language is found therein:

> "Contrary to the judgment of the trial court in the Seber case, and the trial court here, we held, in accord with the state law, that the taxable status of all real property in Oklahoma was fixed as of the assessment date which is January 1st of each year for the ensuing fiscal and taxable year beginning July 1st. Consequently, all the lands in question were assessable because non-exempt on January 1, 1936, and were taxable by the state for the ensuing fiscal and taxable year beginning July 1, 1936, although declared exempt from state taxation by the Act of June 20, 1936. By this concession, we accorded proper respect to the state scheme of ad valorem taxation as judged by state law. * * *"

This Federal decision stands for the proposition that a State Legislature has the authority to fix the tax assessment date six months before the actual collection and use of the tax.

CONCLUSION

Appellee respectfully submits that there has been no violation of the "due process" clause of the United States Constitution on the facts presented by this record. This is simply a taxation by West Virginia of personal property having a tax situs in West Virginia. The fact that appellant's property acquired a new tax situs in Maryland, and was taxed again, does not give rise to a Federal question. Appellee respectfully requests that appellant's request for appeal be denied.

Respectfully submitted,

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